Supreme Court of the United States

OCTOBER TERM, 1946

No. 206

EUGENE KOSTER,
Petitioner,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,
Respondent.

BRIEF FOR PETITIONER.

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INDEX

	PAGE
A—The Opinions Below	1
B—Jurisdiction	1
C—Summary Statement of the Case	2
1. Character of the action	2
2. Lumbermens' motion to dismiss	3
3. The decisions below	4
D—Assignment of Errors	5
Summary of Argument	5
POINT I—This action does not involve the internal affairs of a foreign corporation	6
POINT II—The venue statute gives petitioner an absolute right to bring this action in the district of his residence	9
POINT III—Institution of this suit in the Eastern District of New York was neither vexatious nor oppressive	15
POINT IV—Even if it were held that the venue statute does not give petitioner an absolute right to sue in New York, the District Court was bound by New York law to take jurisdiction	20

CASES CITED.

	PAGE
Atchison, T. & S. F. R. Co. v. Wells, 265 U. S. 101 (1924)	17
Atkins v. Fiber Disintegrating Co., 18 Wall. (85 U. S.) 272 (1874)	11
Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44 (1941)	9, 10
The Belgenland, 114 U. S. 355 (1885)	11
Bingham v. Ditzler, 309 Ill. App. 581 (1941)	8
Canada Malting Co. v. Paterson Steamships, Ltd., 285 U. S. 413 (1932)	11
Canadian Pacific R. Co. v. Sullivan, 126 F. 2d 433 (C. C. A. 1, 1942), cert. den. 316 U. S. 696	18
Chaplin v. Selzmick, 293 N. Y. 529 (1944)	8
Charter Shipping Co. v. Bowring, Jones & Tidy, 281 U. S. 515 (1930)	11
Cohens v. Virginia, 6 Wheat. (19 U. S.) 264 (1821)	9
Davis v. Farmers' Co-Op. Equity Co., 262 U. S. 312 (1923)	17
Duffy v. Mutual Benefit Life Ins. Co., 272 U. S. 613 (1926)	8
Egbert v. Short, (1907) 2 Ch. 205	16, 17
Erie R. Co. v. Tompkins, 304 U. S. 64 (1938)	21
Ernst v. Rutherford & B. S. G. Co., 38 App. Div. 388 (1899)	7, 8
Ewing v. Orr Ewing, (1885) 10 App. Cas. 453 (H. L.)	16
General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261 (1922)	11, 13

PAGE

Gilbert v. Gulf Oil Co., 153 F. 2d 883 (C. C. A. 2, 1946) 10, 11, 21

Goldstein v. Lightner, 266 App. Div. 357 (1943), aff'd 292 N. Y. 670 7

Griffith v. Bank of New York, 147 F. (2d) 899 (C. C. A. 2, 1945) 10

Hallenberg v. Greene, 66 App. Div. 590 (1901) 7

Hamm v. Christian Herald Ass'n, 236 App. Div. 639 (1932) 7

Hirliman v. Southern Pac. Co., 268 App. Div. 192 (1944) 18

International Milling Co. v. Columbia T. Co., 292 U. S. 511 (1934) 18, 19

Jackson v. Smith, 254 U. S. 586 6

Jacobs v. Mexican Sugar Refining Co., 104 App. Div. 242 (1905) 7

Knights Templars Ind. Co. v. Vail, 206 Ill. 404 (1903) 8

Langnes v. Green, 282 U. S. 531 (1931) 11

Logan v. Bank of Scotland, (1906) 1 K. B. 141 16

Massachusetts v. Missouri, 308 U. S. 1 (1939) 10

Meredith v. Winter Haven, 320 U. S. 228 (1943) 11

Miller v. Quincy, 179 N. Y. 294 (1904) 7

Monahan v. Kenny, 248 App. Div. 159 (1930) 8

Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377 (1910) 16

In re Norton's Settlement, (1908) 1 Ch. 471 ..... 16, 20

Panstwowe Zaklady Gniviozne v. Automobile Ins. Co. of Hartford, 36 F. 2d 504 (D. C., S. D. N. Y., 1928) 22

Peleak v. Bartos, 328 Ill. App. 435 (1946) 8

PAGE

Ramsey v. Rosenthal, 242 App. Div. 526 (1934) 7

Reeve v. Cromwell, 227 App. Div. 32 (1929) 21

Rogers v. Guaranty Trust Co., 288 U. S. 123 ..... 4, 13, 20

Schwartz v. Kemper (U. S. D. C., N. D. Ill. E., Index No. 46-C-96 4

Société du Gaz de Paris v. "Les Armateurs Français", (1926) Sess. Cas. 13 (H. L.) 12, 15, 16

Summerall v. United Fruit Co., 80 F. 2d 1020 (C. C. A. 2, 1936), aff'g 17 F. Supp. 363 (D. C., S. D. N. Y., 1935) 21

Tarlow v. Archbell, 47 N. Y. S. 2nd 3 (1943), aff'd 269 App. Div. 837 (1945) 7

Wedemann v. U. S. Trust Co. of New York, 258 N. Y. 315 (1932) 21

Weiss v. Routh, 149 F. 2d 193 (C. C. A. 2, 1945) 21

Williams v. Green Bay & Western R. Co., 326 U. S. 549 (1946) 4, 5, 6, 7, 11, 12, 13, 14, 15

Williamson v. North Eastern Ry. Co., 11 Rettie (Sess. Cas., 4th Ser.) 596 (1884) 16

Winger v. Chicago City Bank & Trust Co., 394 Ill. 94 (1946) 4, 8

Young v. Equitable Life Assn. Soc., 49 Misc. 347 (1906), aff'd 112 App. Div. 760 (1906) 8

OTHER AUTHORITIES

	PAGE
Blair, The Doctrine of Forum Non Conveniens, 29 Col. L. Rev. 1	11, 15
Civil Rules of District Court for Eastern New York, Rule 45	21
Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867	15
Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41	15
Gibb, International Law of Jurisdiction (1926), pp. 212, 213	15
Pomeroy's Equity Jurisprudence (3rd Ed.), Sec. 1095	8
Restatement, Agency, Secs. 312, 314	6
Restatement, Conflict of Laws, Sec. 199	7
28 U. S. C. Sec. 41	1
28 U. S. C. Sec. 112	2, 5, 9
28 U. S. C. Sec. 347	1

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A

The Opinions Below.

The opinion of the District Court for Eastern New York (R. 22), by Abruzzo, D. J., is reported 64 F. Supp. 595.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 30), by Swan and Chase, C. JJ., is reported 153 F. 2d 888. Clark, C. J., dissented in a separate opinion (R. 35), 153 F. 2d 891.

B

Jurisdiction.

The jurisdiction of the District Court rests upon diversity of citizenship, § 24 of the Judicial Code, 28 U. S. C. § 41.

The jurisdiction of this Court rests upon § 240 of the Judicial Code, 28 U. S. C. § 347. This Court granted certiorari on October 14, 1946.

C

Summary Statement of the Case.

Petitioner asks this Court to review the Circuit Court's affirmance (R. 38) of the final order of the District Court dismissing the action on the ground that it was brought in a *forum non conveniens* (R. 28). A review is also sought of the Circuit Court's denial of rehearing (R. 39).

1. Character of the action.

This is a derivative suit for a money judgment brought by petitioner as plaintiff on behalf and for the benefit of defendant-respondent (American) Lumbermens Mutual Casualty Company ("Lumbermens" hereafter) (R. 3).

Lumbermens is a mutual insurance company organized in Illinois, licensed to do and doing business in New York (R. 14). Petitioner, a citizen of New York and a resident of its Eastern District (R. 2), has been since May, 1941, and now is a member and policy holder of Lumbermens (R. 3).

Lumbermens is only a formal or nominal defendant. The real defendants are James S. Kemper, the President, Manager and Chairman of the Board of Lumbermens (R. 3), and James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), an Illinois corporation (R. 3) controlled by Kemper and his family (R. 5).

The complaint (R. 2) charges Kemper with the waste and diversion of Lumbermens' assets. Kemper caused Lumbermens to pay him excessive salary and other compensation for 1942 (first cause of action); to pay unwarranted commissions and fees to Kemper & Co. (second cause of action); and to sell to him, and to persons allied with him, substantial amounts of securities at prices well below their value (third and fourth causes of action).

The complaint prays that Kemper and Kemper & Co. be directed to account to Lumbermens for its damages and for their profits (R. 11).

2. Lumbermens' motion to dismiss.

Lumbermens, for whose benefit this action is brought, moved to dismiss it on two grounds: (1) *forum non conveniens;* and (2) absence of an indispensable party defendant (R. 13-14). The second ground of motion was overruled by the Circuit Court (R. 31) and will not again be referred to herein.

Lumbermens' motion did not question federal jurisdiction or the propriety of venue. Diversity of citizenship and a $3,000 amount in controversy are alleged (R. 2-3) and undisputed. The venue, laid in the district of petitioner's residence (R. 2), complies with § 51 of the Judicial Code, 28 U. S. C. § 112.

But Lumbermens contended that the District Court, in the exercise of its discretion, should decline jurisdiction because this suit involves its "internal affairs" which can more conveniently be adjudicated in Illinois, the state of its incorporation, than in New York (R. 14-20). In support of the plea of inconvenience Lumbermens stated that its head office is in Chicago; five of its seven directors, most of its officers and more than one-third of its employees reside in Illinois; its general business records are kept there; most of the witnesses and records necessary for the trial would have to be brought from Chicago to New York with consequent expense, loss of time and inconvenience (R. 17-19). By contrast, it was contended that petitioner's proportionate individual interest in the recovery would be negligible and that trial of the action in Illinois would put him to no substantial inconvenience (R. 17).

Lumbermens further argued that the action involves difficult problems of Illinois law which could more efficiently be determined by the courts of that state, including the question whether petitioner is barred from access to the courts by a provision of the Illinois Insurance Code allegedly requiring him to address his complaint to the Director of Insurance of Illinois (R. 26-27).

3. The decisions below.

(a) *The District Court's decision* (R. 22): The District Court held that the action involves the internal affairs of Lumbermens and that the difficulty of bringing witnesses and records from Chicago to New York, the scarcity of hotel accommodations in New York, and the necessity of deciding difficult questions of Illinois law make Illinois the most appropriate forum.

(b) *The Circuit Court's majority decision* (R. 30): The Circuit Court, in affirming this decision, held:

1. This action does not involve the internal affairs of Lumbermens since it seeks only a money judgment (referring to *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549 [1946]) (R. 32).

2. Had this action been brought in the New York State courts, jurisdiction would have been mandatory (R. 32, note 2).

3. Under the law of Illinois, petitioner is entitled to maintain this action and is not relegated to his remedy before the Illinois Director of Insurance* (R. 33-34).

4. Nevertheless, the action must be dismissed because the District Court, without abuse of discretion, found the suit "so vexatious or oppressive that 'considerations of convenience, efficiency and justice point to the courts of the state of the domicile as appropriate tribunals'" (referring to *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 131, and to the *Williams* case, *supra*) (R. 34-35).

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* This conclusion is now fortified by *Winger* v. *Chicago City Bank & Trust Co.*, 394 Ill. 94 (1946). Upon a complaint substantially the same as that at bar, the United States District Court for the Northern District of Illinois, Eastern Division, reached the same result in *Schwartz* v. *Kemper*, Index No. 46-C-96. The opinion in the latter case, dated October 28, 1946, rests on a comprehensive discussion of the pertinent Illinois authorities.

(c) *Judge Clark's dissent* (R. 35): Judge Clark thought that *Williams v. Green Bay & Western R. Co., supra*, 326 U.S. 549, restricted rather than extended the scope of the *forum non conveniens* rule. That rule, theretofore limited to cases involving the internal affairs of foreign corporations and to certain admiralty controversies, cannot be extended to actions seeking merely a money judgment. The mere inconvenience of the chosen forum to the defendant and to witnesses is not enough to render the suit vexatious or oppressive.

D

Assignment of Errors.

1. The Circuit Court erred in overruling petitioner's contention that the venue statute (§ 51 of the Judicial Code, 28 U. S. C. § 112) gives petitioner an absolute right to bring this suit in the Eastern District of New York where he resides.

2. The Circuit Court erred in holding that the institution of this suit in the district in which plaintiff resides and defendant is licensed to do and doing business was vexatious or oppressive.

3. The Circuit Court erred in refusing to follow the law of New York under which the court must retain jurisdiction of an action such as that at bar.

Summary of Argument.

We propose to show:

1. This action does not involve the internal affairs of a foreign corporation (Point I);

2. The venue statute gives petitioner an absolute right to bring this action in the district of his residence (Point II);

3. In any event, the choice of the New York forum was neither vexatious nor oppressive (Point III); and

4. The District Court should have followed the laws of the State of New York under which jurisdiction of an action such as that at bar is mandatory (Point IV).

POINT I

This action does not involve the internal affairs of a foreign corporation.

Lumbermens' motion to dismiss the complaint invokes the doctrine of *forum non conveniens* on the theory that this action would require the court "to interfere with and control the internal affairs of a foreign insurance corporation" (R. 13-14). The District Court adopted this contention (R. 27, 28).*

But the Circuit Court rejected it and concluded that "the district court should not decline jurisdiction on the ground that the action involves the internal affairs of a foreign corporation" (R. 32).

Since respondent, however, still maintains its original position, we shall briefly show that this action is, indeed, not an "internal affairs" suit.

1. In the light of this Court's recent decision in *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549 (1946), this conclusion is inevitable. The action seeks only a money judgment; and it seeks that judgment only against the defendants other than Lumbermens. It demands an accounting by Lumbermens' fiduciaries† for their alleged

* The District Court's decision was rendered before this Court's decision in *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549 (1946).

† That Kemper, as the president and general manager of Lumbermens, occupied a fiduciary position requires no discussion. Kemper & Co., his personal holding company, by knowingly participating in Kemper's unfaithfulness, became equally liable; *Jackson* v. *Smith*, 254 U. S. 586, at 589 (1921); *Restatement, Agency*, §§ 312, 314.

breaches of duty; but it does not invoke the exercise of the state's visitorial or supervisory powers over the foreign corporation. Enforcement of the court's decree against those defendants over whom it has personal jurisdiction will be routine. The suit is thus clearly not one involving the internal affairs of a foreign corporation, as defined in the *Williams* case.

2. Nor would the law of New York, assuming it to be applicable, permit a different conclusion. It is well settled in New York that a derivative suit on behalf of a foreign corporation, seeking an accounting for the waste or diversion of corporate assets, does not involve the "internal affairs" of the foreign corporation. In such an action the jurisdiction of the New York courts is mandatory. The Circuit Court so held (R. 32-33, note 2); and the cases are unanimous.

Miller v. *Quincy*, 179 N. Y. 294 (1904);
Goldstein v. *Lightner*, 266 App. Div. 357 (1943), aff'd 292 N. Y. 670;
Ramsey v. *Rosenthal*, 242 App. Div. 526 (1934);
Hamm v. *Christian Herald Ass'n*, 236 App. Div. 639 (1932);
Jacobs v. *Mexican Sugar Refining Co.*, 104 App. Div. 242 (1905);
Hallenberg v. *Greene*, 66 App. Div. 590 (1901);
Ernst v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388 (1899);
Tarlow v. *Archbell*, 47 N. Y. S. 2nd 3, at 7-8 (1943), aff'd 269 App. Div. 837 (1945);
Restatement, Conflict of Laws, sec. 199, and N. Y. Annotations.

The fact that these cases involved derivative suits brought by shareholders or directors of stock corporations, rather than by a member and policyholder of a mutual insurance company, supports no distinction. For "each member bears a relation to the mutual company

analogous to that which a stockholder bears to the joint stock company in which he holds stock"; *Duffy* v. *Mutual Benefit Life Ins. Co.*, 272 U. S. 613, at 619 (1926); *Young* v. *Equitable Life Ass. Soc.*, 49 Misc. 347, at 361-2 (1906), aff'd 112 App. Div. 760 (1906); *Knights Templars Ind. Co.* v. *Vail*, 206 Ill. 404, at 411-2 (1903); *Pelcak* v. *Bartos*, 328 Ill. App. 435, at 443 (1946). The Court below, accordingly, saw "no valid distinction between a stockholder's and a policyholder's derivative suit seeking relief of this character" (R. 33).

3. Under Illinois law the right of a member and policyholder to sue derivatively on behalf of a mutual insurance company is now established: *Winger* v. *Chicago City Bank & Trust Co.*, 394 Ill. 94 (1946); *Pelcak* v. *Bartos*, *supra*. If this suit were brought by Lumbermens itself against its unfaithful fiduciaries, its "internal affairs" would obviously not be involved. The character of the suit is not changed because it is brought derivatively by petitioner on behalf and in the right of Lumbermens. The complainant in a derivative action is only the "instigator" of the suit; the corporation, although a "nominal party defendant", is "in reality a plaintiff". *Monahan* v. *Kenny*, 248 App. Div. 159, at 160 (1936); *Chaplin* v. *Selznick*, 293 N. Y. 529, at 532 (1944); *Bingham* v. *Ditzler*, 309 Ill. App. 581, at 594 (1941), quoting from *Pomeroy's Equity Jurisprudence* (3rd Ed.), sec. 1095. The corporation may sue its unfaithful directors and officers in any appropriate venue in which it finds them, unhampered by the internal affairs rule; and since "the right of the plaintiffs as stockholders to compel a restoration by the officers to the corporation is co-extensive with the right of the corporation itself", *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388, at 391 (1899), a stockholder or policyholder in a derivative suit has the same choice.

We submit, therefore, that the Circuit Court properly held that this action does not involve the internal affairs of a foreign corporation.

POINT II

The venue statute gives petitioner an absolute right to bring this action in the district of his residence.

Although the Circuit Court rejected respondent's basic contention that this action involves the internal affairs of a foreign corporation, it nevertheless dismissed this action as brought in a *forum non conveniens*. In so holding, the Circuit Court enunciated the novel and far-reaching principle that actions of any kind, even though for a simple breach of contract or fiduciary duty, must not only comply with the statutory jurisdictional and venue requirements, but must also meet an additional judicial requirement: That the district of suit be not "vexatious or oppressive".

We submit that Congress, by enacting the venue statute, § 51 of the Judicial Code, 28 U. S. C. § 112,* gave petitioner the absolute right to sue in the district of his residence.

1. The rule that federal jurisdiction, once its statutory requirements are met, is mandatory goes back to *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, at 404 (1821). That federal venue is equally mandatory has been well established since *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941).

In the *Kepner* case this Court construed § 6 of the Federal Employers' Liability Act under which an action may be brought in any one of several specified districts. This Court held that the plaintiff had an absolute choice of venue regardless of inconvenience and expense to the defendant resulting from the necessity of bringing remote witnesses into the jurisdiction:

* § 51 of the Judicial Code, so far as pertinent, provides: "* * * where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative * * *. Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York." (314 U. S., at 54)

Both the plaintiff and the defendant in the *Kepner* case were residents of Ohio; the accident had occurred there; and approximately twenty-five witnesses resided near the place of the accident who could be transported only at considerable cost to New York where Kepner had brought his suit. Nevertheless, this Court rejected the Railroad's contention that the prosecution of the suit in New York would be "an unreasonable, improper and inequitable burden" upon it (314 U. S., at 48).

There is no distinction in principle between the special venue under § 6 of the Federal Employers' Liability Act and the general venue under § 51 of the Judicial Code: *Gilbert* v. *Gulf Oil Co.*, 153 F. 2d 883, at 885 (C. C. A. 2, 1946). "The phrasing of the section [§ 6] is not unique; it follows the familiar pattern generally employed by Congress in framing venue provisions" (Frankfurter, J., dissenting in the *Kepner* case, 314 U. S., at 56, 62). The absolute choice allowed by one section clearly bespeaks, therefore, the similar right granted by the other.

2. Federal courts do on occasion decline jurisdiction in favor of a more convenient forum; but this power has been limited to "particular classes of cases", *Massachusetts* v. *Missouri*, 308 U. S. 1, at 19 (1939), where "exceptional circumstances of a *stereotyped nature*" intervene; *Griffith* v. *Bank of New York*, 147 F. (2d) 899, at 904 (C. C. A. 2, 1945). However, analysis reveals that these "particular" cases do not constitute exceptions from the mandatory venue statute.

(a) Federal courts can reject suits involving the internal affairs of a foreign corporation. This rejection, how-

ever, is due to "the basic reason (of) the impossibility of making an effective decree", *Blair, The Doctrine of Forum Non Conveniens*, 29 Col. L. Rev. 1, at 22, ftn. 105; *Williams* v. *Green Bay & W. R. Co.*, *supra*, 326 U. S., at 555-6. Accordingly, this Court held, in the *Williams* case, that an action seeking a mere money judgment does not involve internal corporate affairs, since the effectiveness of the decree in such a case is unquestionable. The internal affairs rule thus is more nearly one of "substantive law—that of corporate supervision"; *Gilbert* v. *Gulf Oil Co.*, *supra*, 153 F. 2d, at 885. Hence, it does not exemplify judicial power to nullify the plaintiff's absolute choice of suing in any proper venue.

(b) Cases involving a conflict of jurisdiction between courts and administrative agencies generally or between federal and state governments are summarized at length in *Meredith* v. *Winter Haven*, 320 U. S. 228, at 235-236 (1943). These cases patently are not exceptions to the mandatory venue provisions; since they do not involve the geographical locale of litigation.

(c) Admiralty cases: Such cases are most frequently cited to establish the power to apply the doctrine of *forum non conveniens*. *The Belgenland*, 114 U. S. 355 (1885); *Charter Shipping Co.* v. *Bowring, Jones & Tidy*, 281 U. S. 515 (1930); *Langnes* v. *Green*, 282 U. S. 531 (1931); *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932). However, admiralty cases are not covered by any venue statute; *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. (85 U. S.) 272 (1874). Since Congress did not specify the district in which admiralty suits shall be brought, the doctrine of *forum non conveniens* is afforded free play.

(d) The same observations may well be applicable to cases removed from the state to the federal courts; they, too, are not within the scope of the venue statute. *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 271-9 (1922).

3. We submit that *forum non conveniens* has a proper, perhaps an essential function in any judicial system or field of litigation in which the legislature fails to fix the place in which action can and shall be brought. Under such a system or in such a field, the plaintiff can choose a forum without regard to any of his legitimate interests and for the sole purpose of vexing and harassing the defendant. To prevent such abuses courts have adopted the doctrine of *forum non conveniens*. Its operation is indicated by the leading case of *Société du Gaz de Paris* v. *"Les Armateurs Français"*, (1926) Sess. Cas. 13 (H. L.), at 20, which held the doctrine to be applicable where the chosen forum "is not a natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the locus contractus or the locus solutionis" (quoted with approval in *Williams* v. *Green Bay & W. R. Co.*, *supra*, 326 U. S. 549, at note 4).

In the absence of a controlling statute, a forum will thus be held "natural or proper" if it has sufficient contacts with the residence of the parties or the subject matter of the controversy. But the judicial quest for the "natural or proper" forum becomes meaningless under a system such as that created by the federal venue statute, which restricts litigation to the residence of the plaintiff or the defendant. Under our federal system, at least so far as original diversity jurisdiction is concerned, Congress has assumed the task, left by other jurisdictions to the courts, of circumscribing the forum or venue in which action must be instituted. In so doing, Congress limited the choice to confines much narrower than those allowed by the judge-made rule of *forum non conveniens*. Of the several contacts which, under other systems, render a forum "natural or proper", Congress rejected all except the residence of the parties; but residence of the parties has been given definite statutory sanction as a proper and sufficient basis for the choice of forum.

The fluid rule of other jurisdictions was thus replaced in our federal system by one more rigid, to be sure, but also

more certain in its application. The purposes of the two systems are the same; but they are achieved by different methods. The judge-made rule of *forum non conveniens* and the statutory rules of venue, since they are *in pari materia*, are, by their nature, mutually exclusive. To engraft the rule of judicial discretion on ours, which is aimed at certainty, would defeat the purposes of Congress and defy the absolute terms of the venue statute.

4. It is true that *Williams* v. *Green Bay & W. R. Co.*, *supra*, 326 U. S., at 554, 559, mentions the "vexatious or oppressive" choice of forum as a ground for dismissal. However, the question whether application of the doctrine of *forum non conveniens* is inconsistent with the absolute terms of the venue statute was not involved in the *Williams* case. For the *Williams* action was not an original federal court suit; it had been removed from the state to the federal court (326 U. S., at 550-1). The venue statute was, therefore, by its very terms inapplicable, *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, *supra*, 260 U. S., at 274-9. The problem in the case at bar, whether the applicability of the venue statute precludes application of the *forum non conveniens* doctrine, could therefore not arise in the *Williams* case.

Moreover, we do not believe that the *Williams* case was intended to establish *forum non conveniens* as a broad and all-pervasive doctrine. The *Williams* action had been dismissed by the Circuit Court as involving the internal affairs of a foreign corporation (147 F. 2d 777). But even an internal affairs suit may be dismissed only if "considerations of convenience, efficiency and justice" point to the domicile of the corporation as the more appropriate forum (see *Rogers* v. *Guaranty Trust Co.*, *supra*, 288 U. S. 123, at 131). This Court, therefore, in reversing the Circuit Court's decision in the *Williams* case, relied on two separate grounds: The *Williams* suit was not an internal affairs action; and, in any event, the plaintiff's choice

of the New York forum was neither vexatious nor oppressive (326 U. S., at 559-560).

The latter ground was clearly appropriate to the decision of a case which was claimed to involve the internal affairs of a foreign corporation. But there is nothing in the *Williams* opinion to suggest that a finding of "vexatious or oppressive" would justify the dismissal of a suit not falling into any of the "particular classes of cases" to which the doctrine of *forum non conveniens* has heretofore been confined (*supra*, p. 10). This Court, we believe, would have used different language had it intended to extend the doctrine, beyond its traditional limits, to simple actions such as one for breach of contract or for an accounting by an unfaithful fiduciary.

5. From a pragmatic point of view the application of *forum non conveniens* to original federal court litigation would hardly commend itself. Federal diversity jurisdiction and venue present a maze of intricate technical problems. The multitude of decisions dealing with the subject attests to the difficulties which in nearly every federal case precede the reaching of the merits. To add a rule making jurisdiction dependent upon the striking of a balance of convenience and efficiency would swell the preliminaries of federal litigation to altogether inordinate proportions. Since the decision would depend upon the district court's discretion, the complexities of federal jurisdiction and venue would be aggravated by the uncertainty and delay inherent in every exercise of discretionary judicial power.

We submit, that the venue statute gives petitioner an absolute right to maintain this suit in the Eastern District of New York, the district of his residence, and that the District Court was without discretionary power to relegate him to another forum.

POINT III.

Institution of this suit in the Eastern District of New York was neither vexatious nor oppressive.

For argument under this point we assume that an action, even though brought in the proper venue, may be dismissed in the court's discretion as "vexatious or oppressive". We propose to show that the facts disclosed by the record fail, as a matter of law, to furnish any basis for a finding that the selection of the New York forum was vexatious or oppressive.

1. The Circuit Court, in pronouncing the rule of "vexatious or oppressive", relied solely on *Williams* v. *Green Bay & W. R. Co., supra,* 326 U. S. 549. The *Williams* case does not define those terms;* nor is a definition to be found in legal writings such as those of *Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law* (29 Col. L. Rev. 1), *Foster, Place of Trial in Civil Actions* (43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41), and *Dainow, The Inappropriate Forum* (29 Ill. L. Rev. 867). This Court in the *Williams* case, *supra,* cited two other authorities: A Scottish decision, *Société du Gaz de Paris* v. *"Les Armateurs Français"*, (1926) Sess. Cas. 13 (H. L.); and a British author, *Gibb, International Law of Jurisdiction* (1926), pp. 212, 213.

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* In the *Williams* case, *supra,* 326 U. S., at 559-560, this Court enumerated various facts—such as availability of witnesses and records—as indicating "that it would not be vexatious or oppressive to entertain this suit in New York". That was obviously correct reasoning; for the choice of a forum convenient to both parties cannot be vexatious or oppressive. It does not follow conversely that the selection of a forum, merely because it is inconvenient to the defendant, is "vexatious or oppressive". One may prove that an object is not black by showing that it is white; but proof that an object is not white does not establish that it is black, for it may be gray.

2. Scottish cases are not too helpful as authorities in this country. Scotland has adopted the civil law rule of *actor sequitur forum rei*—the plaintiff must sue in the forum of the defendant; *Williamson* v. *North Eastern Ry. Co.*, 11 Rettie (Sess. Cas., 4th Ser.) 596, at 598 (1884). That principle necessarily colors those Scottish decisions which apply the rule of *forum non conveniens;* see *Société du Gaz de Paris* v. *"Les Armateurs Français"*, *supra*, (1926) Sess. Cas., at 21. The rule *actor sequitur forum rei* fits ill into our common law system of jurisprudence which recognizes "the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him": *Netograph Mfg. Co.* v. *Scrugham*, 197 N. Y. 377, at 380 (1910). Both Scottish and English courts have emphasized, therefore, that Scottish law carries the doctrine of *forum non conveniens* much further than England: *Ewing* v. *Orr Ewing*, (1885) 10 App. Cas. 453, at 506 (H. L.); *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141, at 149. Even so, Scottish law recognizes that a forum bearing a "natural or proper relation" to the residence of the parties or to the subject matter of the controversy will not be condemned as *forum non conveniens* (see *supra*, p. 12).

3. More pertinent are the English authorities cited by *Gibb*. Their rule is that jurisdiction may be declined only if both parties are non-residents of England and if the English forum has been selected in bad faith, with the sole intent of harassing the defendant; *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141; *Egbert* v. *Short*, (1907) 2 Ch. 205; *In re Norton's Settlement*, (1908) 1 Ch. 471. The last cited case, summing up the earlier law, holds:

> "* * * in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense,

that *it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country.*" (p. 479)

"* * * Mrs. Norton has brought the action in England, not for the purpose of any legitimate advantage which she might gain by so doing, but for the purpose of putting her husband in such a position that he would practically be compelled to settle the action on the terms of the solicitors' letter which I have already referred to.

"I have gone into the matter at this length in order to make it quite clear that *questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings.*" (p. 482) (Italics added)

Similarly in *Egbert* v. *Short*, *supra*, (1907) 2 Ch., at 214:

"She (plaintiff) is not resident in England in the proper sense of the term. * * * this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled."

4. In this country, those decisions dealing with actions burdensome to interstate commerce furnish valuable guidance in determining when the selection of a forum is "vexatious or oppressive". Suits against interstate carriers instituted in a state of which neither the plaintiff nor the defendant was a resident, in which the defendant was not transacting business, and in which the wrong complained of had not occurred, have been dismissed on the ground that the selection of the forum imposed an undue burden on interstate commerce: *Davis* v. *Farmers' Co-Op. Equity Co.*, 262 U. S. 312 (1923); *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101 (1924). But otherwise where—as in the present case—the plaintiff was a resident of the state in which he sued and the defendant transacted some measure of business there. Residence of the plaintiff has been held to "relieve it of the opprobrium of an imperti-

nent intruder when it went into the local courts", *International Milling Co.* v. *Columbia T. Co.*, 292 U. S. 511, at 519 (1934, per Cardozo, J.). Residence, "even though not controlling, is a fact of high significance"; *ibid.*, p. 520. And where the defendant

> "brought its property into that state, not fortuitously or by a rare accident but in furtherance of a systematic course of business, [it] subjected itself to suit . . . at the instance of a local creditor, who could not with equal convenience or facility have sued it anywhere else. Such a suit may be a burden, *but oppressive or unreasonable it is not.*" (292 U. S., at 520-1; italics added)

Nor is jurisdiction lost "because the chief witnesses on the trial reside in other states":

> "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative convenience of the parties."
>
> *International Milling Co.* v. *Columbia T. Co.*, *supra*, 292 U. S., at 521.

Accord:

Canadian Pacific R. Co. v. *Sullivan*, 126 F. 2d 433, at 437-440 (C. C. A. 1, 1942), cert. den. 316 U. S. 696;

Hirliman v. *Southern Pac. Co.*, 268 App. Div. 192 (1944).

5. The present petitioner, like that in the *International Milling* case, *supra*, is a resident of the forum. He has brought the action in the district in which he lives and in which he made his contract with and became a member of respondent. He is represented by a lawyer whom he knows and in whom he has confidence.

Respondent, in turn, is licensed to do business in New York. It is doing business in that state to an extent cer-

tainly greater than was the defendant in the *International Milling* case, *supra*.

In the face of these strong contacts with New York, the burden of bringing witnesses and records to New York—if they must be brought at all (R. 37)—is reduced to a mere inconvenience, to which respondent must submit. No suggestion is made by respondent that petitioner has brought suit in New York for any ulterior purpose, or for any reason other than that of getting justice. Nor is it intimated that it would be "very difficult or practically impossible for respondent to get justice" in New York. The forum may be inconvenient to respondent; litigation there may involve expense; but it was not selected in bad faith. It is, therefore, neither vexatious nor oppressive.

6. Despite these considerations, the Circuit Court thought that it was unable, on appeal, to review the District Court's exercise of discretion in declining jurisdiction (R. 35). However, the District Court's discretion was affected by such errors of law as necessarily destroyed its conclusiveness upon an appellate court.

In rejecting jurisdiction, the District Court relied on a congeries of reasons. At least two of them were clearly erroneous. The District Court held that "the suit relates to the internal affairs of a foreign corporation" (R. 27, 28); the Circuit Court recognized that it does not (R. 32). The District Court held that petitioner's remedy was with the Director of Insurance of Illinois (R. 26); the Circuit Court ruled otherwise (R. 33). Since these erroneous views of the law may have seriously influenced the District Court's exercise of discretion, the appellate court is not concluded by it.

But the District Court's decision is even more fatally defective. The District Court merely held that "the convenience of witnesses and efficiency and justice" point to Illinois as the proper forum (R. 27). This might have been enough on the District Court's premise that the suit in-

volves the internal affairs of an Illinois corporation. *Rogers* v. *Guaranty Trust Co., supra*, 288 U. S., at 131. But this suit is not an "internal affairs" action; and a finding that New York is a less "convenient" and "efficient" forum than Illinois falls far short of one that suit in New York is "vexatious or oppressive".

The terms "vexatious or oppressive" connote conduct much harsher than the mere selection of a forum inconvenient to the defendant. They presuppose conditions in which "it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice". *In re Norton's Settlement, supra* (1908), 1 Ch., at 479. Mere "questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings"; *ibid.*, at 482. Since the District Court did not find that the institution of this action in the Eastern District of New York was "vexatious or oppressive" within this meaning of the term, its exercise of discretion in declining jurisdiction is not conclusive on appeal.

We submit that the Court below erred in holding that the institution of this action in the Eastern District of New York was vexatious or oppressive.

POINT IV

Even if it were held that the venue statute does not give petitioner an absolute right to sue in New York, the District Court was bound by New York law to take jurisdiction.

Assuming, for argument, that § 51 of the Judicial Code does not give petitioner an absolute right to sue in the district of his residence, the question remains whether the District Court's power—or lack of power—to decline jurisdiction is not governed by the law of New York, the state in which the District Court is sitting.

Had this action been brought in the state courts of New York, jurisdiction would have been mandatory and petitioner could not have been relegated to suit in Illinois. *Wedemann* v. *U. S. Trust Co. of New York*, 258 N. Y. 315, at 318 (1932); *Reeve* v. *Cromwell*, 227 App. Div. 32, at 36 (1929); and cases cited *supra*, p. 7. We submit that this New York rule, whether it be deemed substantive or procedural in character, binds the District Court.

If the rule be thought substantive—see *Weiss* v. *Routh*, 149 F. 2d 193, at 195 (C. C. A. 2, 1945)—it binds the District Court under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

If the rule be thought procedural—see *Gilbert* v. *Gulf Oil Co.*, *supra*, 153 F. 2d, at 885—it is no less binding. This follows from Rule 45 of the Civil Rules of the District Court for Eastern New York which provides:

> "Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Federal Rules of Civil Procedure, or of these rules, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States, or in default thereof the procedure which shall then prevail in the Supreme Court of the State of New York shall be applied."

No statute of the United States and no provision of the Federal Rules of Civil Procedure confers upon the District Court discretion to decline jurisdiction once the statutory requirements of venue are met. Nor does "the procedure heretofore prevailing in courts of equity of the United States" support such power; on the contrary, the New York practice relating to discretionary jurisdiction has heretofore been considered as binding in the federal courts; *Sumerall* v. *United Fruit Co.*, 80 F. 2d 1020 (C. C. A. 2, 1936), rg 11 F. Supp. 963 (D. C., S. D. N. Y., 1935); *Panstwowe*

Zakłady Graviozně v. *Automobile Ins. Co. of Hartford*, 36 F. 2d 504 (D. C., S. D. N. Y., 1928). But even if these precedents should not be deemed conclusive, the last part of Rule 45, *supra*, directs application of the local law of procedure. Under that law jurisdiction is mandatory.

Respectfully submitted,

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on the Brief.

Dated, November 21, 1946.